(1)

83-1946

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM SUNDEL,

Petitioner,

v.

JUSTICES OF THE SUPERIOR COURT OF THE STATE OF RHODE ISLAND,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Question Presented

Whether petitioner's retrial would violate his constitutional right not to be subjected to double jeopardy since the trial judge improperly forced the termination of petitioner's first trial by arbitrarily disqualifying petitioner's chosen defense counsel after jeopardy had attached.

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner William Sundel respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the First Circuit which affirmed an order and judgment denying a petition for writ of habeas corpus.

Opinions Below

The opinion of the Court of Appeals is not yet officially reported; a copy is annexed as Appendix A.

The opinion of the district court in this case is not officially reported; a copy of that opinion is annexed as Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on February 29, 1984; a copy of the judgment is annexed as Appendix A.

The Court's jurisdiction is invoked pursuant to Title 28, United States Code, §1254(1).

Statement of the Case

This appeal is from an order of the United States Court of Appeals for the First Circuit affirming an order of the United States District Court for the District of Rhode Island (The Honorable Bruce M. Selya), denying petitioner Sundel's petition for a writ of habeas corpus. That petition challenged the State's right to proceed further with a pending criminal prosecution on the ground that said prosecution violated petitioner's constitutional rights to due process and against subjecting a citizen to double jeopardy.

Petitioner Sundel and one Frank Nelson,[1] were indicted on October 1, 1981 by a grand jury of the Superior Court, Kent County, Rhode Island, which charged them with possession of marijuana with intent to deliver and conspiracy to commit that offense (A014).[2] Shortly thereafter, on October 15, 1981, David Breitbart, Esq., filed a notice of appearance in the case as counsel for Mr. Sundel. Although Mr. Breitbart has been a member in good standing of the New York Bar for fourteen years,[3] he was not a member of the Rhode Island Bar. Consequently, Mr. Breitbart also applied to the Rhode Island Superior Court to be admitted *pro hac vice* to serve as counsel for defendant Sundel. Because the court's rules require local counsel in such circumstances, John A. O'Neill, Esq., a member of the bar of the State of Rhode Island, and counsel for co-defendant Frank W. Nelson, agreed to serve in that capacity. Mr. Breitbart's application for admission *pro hac vice* was granted by Mr. Justice John Bourcier of the Superior Court by order dated January 4, 1982 (A015).

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[1] Two others—Michael Hall and Bonnie Hall, were also indicted.

[2] References preceded by "A" are to Appellant's Appendix to the First Circuit.

[3] Mr. Breitbart is also a member in good standing of the bars of the United States Supreme Court, the United States Court of Appeals for the Second Circuit, and the United States District Courts for both the Southern and Eastern Districts of New York.

Defendants Sundel and Nelson proceeded to trial on March 30, 1982. After pretrial hearings on their motions for suppression of evidence and severance were concluded on March 31, 1982, a jury was empanelled. That jury was sworn and trial commenced with the taking of the first prosecution witness' testimony on April 1, 1982.

The thrust of Mr. Breitbart's defense of Mr. Sundel was that the state's principal witness, Michael Hall, who had admitted his involvement in the crimes charged, was falsely incriminating Mr. Sundel in order to shift blame from himself, curry favor with the prosecution, and thereby improve his own legal predicament. Specifically, Mr. Breitbart planned to show the jury that Hall had a deal with the prosecution which would result in a more lenient sentence for him if he took the stand and incriminated Mr. Sundel.

Throughout the proceedings, Mr. Breitbart did everything a responsible attorney would be expected to do in presenting the best possible defense for his client. Thus, he filed the motions which formed the basis for the pre-trial suppression hearings. He closely questioned the prospective jurors during the voir dire in order to determine whether they had any possible biases which might prevent them from fairly judging the case. He gave an opening statement in which he informed the jury that he would prove to them that Michael Hall was falsely incriminating Mr. Sundel in order to help himself (A023-028).

The trial judge apparently took umbrage with Mr. Breitbart's suggestion that the prosecution had a deal with Hall whereby the latter would get a more lenient sentence if he testified against Sundel. Since the judge was ultimately the one who imposed sentence, he felt that Mr. Breitbart's reference to a sentencing agreement somehow implicated the judge in this agreement. Consequently, the Court criticized Mr. Breitbart for suggesting that the prosecution had made any assurances regarding sentence to Mr. Hall.

Thereafter, while Mr. Breitbart was cross-examining the state's first witness, the judge sustained objection to one of his

questions. When Mr. Breitbart explained the basis for his line of questioning, the judge commented, "Oh, my God," in front of the jury and then precluded further questioning along that line (Tr. 189). At the end of the day's proceedings, Mr. Breitbart moved to be permitted to re-open his cross-examination to go into that area. Counsel for co-defendant Nelson went further, moving to pass the case (declare a mistrial) or for a severance based on the judge's comment in front of the jury. Mr. Breitbart specifically declined to join in Nelson's motion to pass the case.

The following morning, the trial judge stated that he believed that Mr. Breitbart lacked familiarity with "local rules." Initially, the judge stated that he would nevertheless allow Mr. Breitbart to continue as Sundel's attorney if Sundel wished for him to do so. After a further recess, however, the judge *sua sponte* revoked Mr. Breitbart's *pro hac vice* admission to practice (A043-044).

The court then informed Mr. Sundel that he was left with three choices: 1) to proceed with Mr. O'Neill serving as counsel for both Sundel and Nelson, 2) to proceed *pro se*, or 3) to seek new counsel. Mr. O'Neill informed the court, however, that the second option was not feasible since there was a conflict of interests between the two defendants. Left with the options of either defending himself or seeking new counsel, Mr. Sundel chose the latter. The court then ruled that it was passing the case (declaring a mistrial) as to both defendants. Mr. Breitbart, on behalf of Mr. Sundel, objected both to the judge's findings and to his ruling (A045-046, 049).

When the State attempted to proceed with a retrial, Sundel moved to preclude it from doing so on the basis that retrial under such circumstances would violate his rights under the Double Jeopardy Clause of the United States Constitution. Specifically, Sundel argued that the trial judge had acted improperly in disqualifying his chosen attorney in the midst of trial and that it was this unconstitutional action by the trial judge which had precipitated the mistrial. The trial court

denied this motion.[4] On appeal, the Rhode Island Supreme Court likewise rejected petitioner's double jeopardy argument. *State v. Sundel,* 460 A.2d 939, 944 (R.I. 1983).

Having thus exhausted all available state remedies, Mr. Sundel filed a petition for a writ of habeas corpus raising this same issue in the United States District Court for the District of Rhode Island. That court denied the petition in a written opinion on August 23, 1983. In doing so, the court held that the double jeopardy claim did not turn, as petitioner maintained, on whether the trial judge had acted improperly in revoking Mr. Breitbart's *pro hac vice* admission. In fact, the district court refused to decide whether that action by the trial judge had been proper or constitutional. Rather, according to the district court, the only issues were: 1) whether Mr. Sundel, "*after Mr. Breitbart's removal,* voluntarily sought new counsel," (emphasis added) and 2) whether this decision by Mr. Sundel constituted the manifest necessity which is required before a trial judge may declare a mistrial. The court then proceeded to answer both of these questions in the affirmative and denied the petition (Appendix B).

The First Circuit, adopting the district court's rationale, affirmed its denial of the habeas corpus petition (Appendix A).

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[4] During a colloquy on this motion, the trial judge stated for the first time that it was his recollection that Mr. Sundel had first indicated his intention to seek other counsel during the recess in the court proceedings on the morning of April 2, 1982. If this were so, however, there would have been no reason for the judge to thereafter revoke Mr. Breitbart's *pro hac vice* admission in this case. Moreover, the judge's recollection is directly contradicted by the record, wherein Mr. Breitbart repeatedly objected to the judge's actions in revoking his *pro hac vice* admission and forcing Sundel to either proceed *pro se* or seek other counsel (A070-077).

REASONS FOR GRANTING THE WRIT

The trial judge caused the mistrial in this case by improperly disqualifying defense counsel after jeopardy had attached; consequently, retrial would violate petitioner's constitutional right not to be subjected to double jeopardy.

Well after jeopardy had attached at petitioner's trial, the trial judge disqualified petitioner's chosen counsel from representing him further in that proceeding. That disqualification was both unjustified and unconstitutional. Moreover, it left petitioner with no realistic alternative except to seek other counsel. The mistrial which resulted from these circumstances was not justified by manifest necessity; rather, it was the product of improper actions by the trial judge. Consequently, any retrial would violate petitioner's constitutional right not to be subjected to jeopardy more than once on any criminal charge.

Once the jury had been empanelled and the first witness had taken the stand, jeopardy had officially attached in this case. *See, e.g., Crist v. Bretz,* 437 U.S. 28 (1978). At that moment, petitioner Sundel became constitutionally entitled to have his guilt or innocence of the crimes charged determined by that particular jury.

The constitutional protection against double jeopardy does more than prohibit a second trial after a defendant has been acquitted; it "also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.' " *Arizona v. Washington,* 434 U.S. 497, 503 (1978). The purpose of the double jeopardy clause is not simply to insure against harassment of an accused through repeated efforts by the State to obtain a conviction after an acquittal. This constitutional right also protects defendants such as petitioner Sundel against the anxiety, embarrassment, expense and restrictions on their liberty that result when, as here, after one trial has been

unjustifiably aborted, the prosecution seeks to again place the defendant in jeopardy by commencing a second prosecution on the same charge. *Green v. United States,* 355 U.S. 184, 187 (1957); *Brady v. Samaha,* 667 F.2d 224, 228 (1st Cir. 1981); *Dunkerly v. Hogan,* 579 F.2d 141, 145 (2d Cir. 1978).

Because the Constitution prohibits retrial in such circumstances, the trial judge "must always temper the decision of whether to abort a trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States v. Jorn,* 400 U.S. 470, 485, 486 (1971). In those cases where the trial judge nevertheless declares a mistrial, the prosecution may not initiate a second trial unless it first satisfies the "heavy burden" of establishing that the mistrial was justified by "manifest necessity." *Arizona v. Washington, supra,* 434 U.S. at 505; *Brady v. Samaha, supra,* 667 F.2d at 228;*Dunkerly v. Hogan, supra,* 579 F.2d at 146.

Moreover, in making that showing, the prosecution may not rely on circumstances brought about by the improper actions of either the prosecutor or the court. *See, e.g., Braxton v. United States,* 395 A.2d 759 (D.C. Ct. App. 1978). Here it was the improper action of the trial judge in disqualifying petitioner Sundel's counsel in the midst of trial which led to the declaration of mistrial. Consequently, the mistrial was not based on a proper showing of manifest necessity and retrial is constitutionally prohibited.

A. The trial judge's disqualification of petitioner Sundel's chosen counsel in the midst of trial was improper.

Petitioner Sundel made a reasoned decision that his defense to the charges in this case could best be presented by a particular attorney, David Breitbart. Once Mr. Sundel had retained Mr. Breitbart to represent him, he was constitutionally entitled, absent exceptional circumstances not present here, to proceed to verdict with that attorney speaking in his behalf. The fact

that Mr. Breitbart was appearing in the case *pro hac vice* did not dilute or eliminate this constitutional right. Nor were the reasons given by the trial judge for disqualifying Mr. Breitbart in the midst of trial in any way sufficient to justify that extreme action. Consequently, the trial judge's action was both unjustified and unconstitutional.

The right to counsel protected by the Sixth and Fourteenth Amendments embraces not only the right to assistance of counsel, but also the right to a reasonable opportunity to retain counsel of one's own choice. *Powell v. Alabama*, 287 U.S. 45, 53 (1932). Moreover, once a particular counsel has entered his appearance, the trial court may not unreasonably interfere with the accused's choice of that attorney to represent him. *Lee v. United States*, 235 F.2d 219 (D.C. Cir. 1956), *aff'd after remand*, 251 F.2d 915 (D.C. Cir. 1958).

This Court has on numerous occasions reaffirmed the principle that a criminal defendant's choice of counsel must be honored. *Reynolds v. Cochran*, 365 U.S. 525 (1961); *Chandler v. Fretag*, 348 U.S. 3 (1954). Unjustified removal of retained counsel constitutes a violation of the Sixth Amendment right to counsel. *See, e.g., United States v. Seale*, 461 F.2d 354, 360 (7th Cir. 1972); *United States v. Mitchell*, 354 F.2d 767, 769 (2d Cir. 1966); *Releford v. United States*, 288 F.2d 298 (9th Cir. 1961).

Thus, numerous state courts have held, under facts analogous to the case at bar, that once an attorney has been retained or assigned and an attorney-client relationship has been established, the trial court may not arbitrarily remove that attorney: "[O]nce counsel has been chosen, whether by the court or the accused, the accused is entitled to the assistance of *that* counsel at trial." *English v. State*, 8 Md. App. 330, 259 A.2d 822, 826 (Md. Ct. Spec. App. 1969) (emphasis in original). *See also, Harling v. United States*, 387 A.2d 1101, 1105 (D.C. Ct. App. 1978); *McKinnon v. State*, 526 P.2d 18 (Alaska Sup. Ct. 1974); *Smith v. Superior Court of Los Angeles County*, 440 P.2d 65 (Cal. Sup. Ct. 1968).

Mr. Sundel's constitutional right to have his defense presented by counsel of his own choosing was not vitiated by the fact that the attorney he had chosen to perform this important function was only admitted to the Rhode Island court *pro hac vice* for purposes of serving as Mr. Sundel's counsel in this case. Although out-of-state counsel may not have an absolute right to be admitted in the first instance, once such admission has been granted. as it was in this case on January 4, 1982, that attorney's role in the case and his relationship to his client attain the same constitutionally protected status as that afforded to regularly admitted counsel. To hold otherwise would be to render such counsel intolerably crippled in the defense of his client, out of the constant fear that zealous advocacy on his part might somehow offend the trial court and lead, as here, to the arbitrary revocation of his temporary admission. Such improper restrictions on the advocacy of *pro hac vice* counsel would be constitutionally intolerable:

> These lawyers whose right to represent the appellants has been denied were not interlopers . . . they were admitted pro hac vice . . .
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> * * *
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> We think it clear that limited to one case though the right of these attorneys to practice was, their standing with respect to this case was no different from that of any other regularly admitted local lawyer. . . . While admission pro hac vice is stated in the rule to be in the discretion of the court, the rights and duties of an outside lawyer, once so admitted, appear to be the same as those of a local lawyer.
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> * * *
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> Assuming that these accused persons could not have claimed representation by out-of-state lawyers as a constitutional right, the representation was granted and may not, without cause, be taken away.

> We have, then, the same situation here as we would have had if a resident member of the Mercer County bar had been abruptly cut off in his representation of a client in a capital case without hearing, without misconduct on his part, without reason assigned for the action. The client's right to representation has been interfered with; the lawyer's right in his professional employment is likewise invaded.
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> *Cooper v. Hutchinson*, 184 F.2d 119, 122-123 (3rd Cir. 1950).

Although this constitutional right to the assistance of chosen counsel is not absolute—gross incompetence, physical incapacity or contumacious conduct that cannot be cured by other means may justify the court's removal of an attorney, even over the defendant's objections—it is well established that "[m]ere disagreement as to the conduct of the defense certainly is not sufficient to permit the removal of any attorney." *Harling v. United States, supra*, 387 A.2d at 1105. The right of a defendant to manage his defense to the charges leveled against him is at the heart of the Sixth Amendment. *Faretta v. California*, 422 U.S. 806 (1975).

Consequently, the disqualification of Mr. Sundel's counsel was constitutionally intolerable unless that counel's conduct had descended to an extreme level of ineptitude or obduracy. *See, eg., Smith v. Superior Court, supra*, 440 P.2d at 73; *McKinnon v. State, supra*, 526 P.2d at 23. The reason for this stringent standard is manifest. As the California Supreme Court stated, in ordering the reinstatement of an attorney who had been removed for "incompetence" after repeatedly infuriating the trial judge with his "abrasive" courtroom manner:

> The outright removal of counsel on the ground of his alleged 'incompetence' is even more of a threat to the independence of the bar than is arbitrary misuse of the contempt power . . . ' [I]f the advocate must labor under the threat that, at any moment, if his argument or advocacy should incur the displeasure or lack of immedi-

> ate comprehension by the trial judge, he may be summarily relieved as counsel on the subjective charge of incompetency by the very trial judge he is attempting to convince, his advocacy must of necessity be most guarded and lose much of its force and effect.' The inhibition imposed on a defense attorney by such a threat constitutes a serious and unwarranted impairment of his client's right to counsel.
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> *Smith v. Superior Court, supra,* 440 P.2d at 74.

The United States Supreme Court has voiced these selfsame concerns in similar fashion:

> While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom or even from conduct so near to the Court as actually to obstruct justice, it is also essential to the fair administration of justice that lawyers be able to make honest good-faith efforts to present their client's cases. An independent judiciary and a vigorous, independent bar are both indispensible parts of our system of justice.
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> *In re McConnell,* 370 U.S. 230, 236 (1962).

See also, Annot., *Power of Court to Change Counsel Appointed for Indigent, Against Objections of Accused and Original Counsel,* 3 A.L.R.4th 1227 (1981) (collecting cases).

The proceedings at Mr. Sundel's aborted trial establish that there was no basis for the trial court to have resorted to so extreme a sanction as disqualification of counsel. Although the trial court, in disqualifying Mr. Breitbart, stated that his action was based on the "inexperience" of defendant's counsel and his "unfamiliarity" with Rhode island rules and procedures[5],

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[5] Significantly, the trial court did not base its disqualification on misconduct or contumacious behavior on the part of counsel. Indeed, the judge referred to counsel as "a very personable young man, [who] simply was not familiar enough with the local rules and the local rules of evidence." (Tr. 245, April 2, 1980).

none of the specific incidents referred to by the trial judge demonstrated such failings, or for that matter, any other impediment to counsel's providing proper representation for Mr. Sundel. Nor was counsel guilty of any misconduct or contumacious behavior. None of the incidents mentioned by the trial judge, standing either individually or collectively, warranted the drastic sanction of disqualification.

In support of his action, the trial judge first cited counsel's failure to demonstrate defendant's standing in the course of the pretrial suppression hearings, suggesting that this was somehow indicative of counsel's "lack of knowledge and understanding" of the issue (Tr. 225, April 2, 1982). The record of the pretrial suppression hearing reveals, however, that the prosecution had never contested defendant's standing and never raised it as an issue warranting denial of relief to defendant. *Cf. Steagald v. United States*, 451 U.S. 204, 210 n.5 (1981); *State v. Farrell*, 443 A.2d 438, 440 n.4 (R.I. 1982) (prosecutor's failure to contest standing may constitute waiver of objection.)[6] Thus, the decision of Sundel's counsel not to raise the standing issue on his own, contrary to evidencing "lack of knowledge or understanding" of the local rules, was in fact entirely appropriate.[7]

The trial judge also attempted to justify his disqualification of Mr. Breitbart by claiming that the latter made "unprece-

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[6] Co-defendant's counsel, likewise never raised the standing issue on behalf of his client. Nevertheless, his qualifications were never questioned by the trial judge.

[7] Mr. Breitbart's main argument in the motion to suppress was that if Major Regan of the Mass. State Police, the informant, had lied to Det. Malley of the R. I. State Police, the affiant for the search warrant, the court should suppress the evidence seized due to misconduct of a law enforcement official (Tr. 74-75). The trial judge disagreed. The R. I. courts have not yet addressed this issue; consequently, counsel was certainly not incompetent for raising it. *See especially, United States v. Cortina*, 630 F.2d 1207 (7th Cir. 1980); 3 W. LaFave *Search and Seizure—A Treatise on the Fourth Amendment*, Sec. 11.3 at 190 & n.245.10.

dented " motions. These included a motion to dismiss the indictment pursuant to Rule 48(a) or (b) or, in the alternative, to exclude Michael Hall from testifying, as well as a motion to dismiss based upon the grand jury minutes. The only evidence presented to the grand jury against Sundel was a sworn statement by Michael Hall, dated August 15, 1981. Mr. Hall did not testify in the grand jury. After Sundel's indictment, however, Hall gave a contradictory statement to the Rhode Island Police on January 22, 1982, in which he admitted lying in his first statement.

Thus, the defendant presented a colorable claim that his indictment was based upon a sworn false statement. *See, e.g., State v. Brown,* 45 R.I. 9, 13-14 (1923), in which the Rhode Island Supreme Court strongly implied that an indictment based upon illegal or incompetent evidence must be dismissed unless there is other evidence to support the indictment. *See also, United States v. Gramolini,* 301 F.Supp. 39 (D.R.I. 1969). Rather than incompetence, these motions show a well-prepared, imaginative trial attorney.[8]

Thirdly, the trial court cited counsel's conduct during the jury voir dire, stating that he:

> repeatedly referred to a prospective State witness as a 'liar' and to the Rhode Island State Police as being fooled by a liar. In addition, he referred to the witness, who is also a codefendant, as having made a 'deal'with the Attorney General for a certain sentence thereby creating the impression in the prospective jurors' minds that the Court was either party to what he designated as a 'deal' or that it had assented to the same. After being cautioned by the Court that such assertion on his part was incorrect, he again, in the presence of the prospective jurors, attempted to explain away his assertion, but indirectly persisted in his earlier statement. (Tr. 226, April 2, 1982).

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[8] In any event, irrespective of whether the trial judge ultimately was correct in his ruling on the merits, it may hardly be said that Mr. Breitbart was inept, incompetent or negligent in raising the issues, which is, after all, the applicable standard for disqualification under *Harling, McKinnon and Smith.*

The trial judge's assertions, including his additional assertion that, "In this Court, the word 'liar' was repeatedly bandied about" (Tr. 222, April 2, 1982), simply are not borne out by the record. In point of fact, on only one occasion during the voir dire (Tr. 41-45, March 31, 1982), did counsel ask a prospective juror whether it would affect his assessment of a witness' credibility that the prosecution had made a deal with the prospective witness for his testimony to the effect that they would make a sentencing recommendation that he receive no jail time. (Tr. 41-42). The Court interrupted counsel, disavowing that any deal had been made with the Court (which is not what counsel had said) and stating that it was an improper line of inquiry in voir dire.[9] In response, counsel stated to the court that, "My question is with the individual's motivation to lie and I wanted to inquire whether or not the jury would take into consideration in evaluating the witness' credibility" (Tr. 43, March 31, 1982).

Certainly, there was a clear basis under Rhode Island law for counsel's inquiry. In *State v. Anthony*, 422 A.2d 921, 924 (R.I. 1980), Rhode Island's highest court recently ruled:

> The defense is entitled to show that an accomplice-witness may have good reason to cooperate with the prosecution. This is one reason why it is important that a defendant be allowed to explore the partiality of a witness in order to establish interest, bias or motive, thereby to discredit the witness and affect the weight of his testimony (citations omitted). To limit completely the defense, however, from

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[9] Petitioner Sundel respectfully disputes the trial court's characterization of this line of inquiry as improper. The prosecution's proof in this matter turned significantly upon the testimony of Michael Hall, a co-defendant of Sundel and Nelson, who had agreed to testify for the prosecution in return for the prosecutor's sentencing recommendation that he receive no jail time, as well as the prosecutor's dismissal of charges against Hall's wife. Clearly, a prosecution witness' motivation to lie—and the juror's recognition thereof—is a plainly significant factor to be explored on voir dire, especially where, as here, it was the state that initially raised the subject (Tr. 14-15, March 31, 1982).

> examining the motive for testifying or the possible bias of a witness is clearly an abuse of discretion.[10]

Here, in conformity with *Anthony*, counsel merely attempted to inquire of prospective jurors whether they would consider an accomplice-witness' possible motives in evaluating his testimony.

More important to the issue of counsel's competence, however, is the fact that when the trial court forbad this line of inquiry, counsel promptly moved to another area. Thus, there was no disobedience or flouting of the court's directives, despite the fact that counsel did have a colorable basis for his inquiry.[11] Indeed, the trial court found no other occasions to limit counsel's voir dire.

The trial judge also referred to counsel's opening as having been somehow improper, allegedly forcing the judge "to sustain numerous objections by the State" (Tr. 227, April 2, 1982). Contrary to the trial judge's assertions, however, the transcript establishes not one single objection or interruption by either the state or the trial judge during counsel's entire opening statement (Tr. 144-150, April 1, 1982)

Finally, the trial judge took counsel to task for having attempted to broaden the scope of cross-examination of the state's first witness beyond matters covered during the direct

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[10] Moreover, the standard federal jury instruction provides, in pertinent part, "You should consider whether the testimony (of an immunized [or accomplice] witness may be colored in such a way as to further the witness' own interests, for a witness who realizes that he may procure his freedom by incriminating another has a motive to falsify." 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions*, Secs. 17.04 and 17.06 (3d ed. 1977).

[11] Curiously, the trial judge found this line of inquiry to be not only improper, but in violation of the Canon of Ethics. Petitioner has been unable to find any specific canon which is violated by reference to a possible sentence a *witness* might have received in exchange for his testimony. *Cf. United States v. DeLarosa*, 450 F.2d 1057 (3rd Cir. 1971); *United States v. Padgent*, 432 F.2d 701, 704 (2d Cir. 1970).

examination (Tr. 227, April 2, 1982). When counsel responded that curtailment of his cross-examination was depriving him of proper confrontation under the Sixth Amendment, the court characterized this argument as somehow "an admission by him that he was unable to effectively represent [defendant] in accordance with our local rules of practice and procedures" (Tr. 228, April 2, 1982).

There is ample authority under Rhode Island law, however, for counsel to probe beyond the strict confines of the state's direct examination in attempting to discredit or lessen the impact of the witness' testimony. *See, e.g., State v. O'Brien*, 412 A.2d 231, 233 (R.I. 1980) ("In addition to interrogating a witness about matters that the witness testified to on direct examination, a cross-examiner may also probe into collateral matters in an attempt to contradict, discredit, explain or lessen the impact of the witness' direct testimony or attack his memory and credibility"); *State v. Bennett*, 405 A.2d 1181, 1183 (R.I. 1979) ("Because one basic purpose of cross-examination is impeachment, there can be no fixed limit to the scope of that examination and the scope must be left to judicial discretion [citation omitted]. This discretion should foster a search for the truth by giving reasonable latitude to the purpose of cross-examination while p eserving a fair and orderly trial"); *State v. Ragonesi*, 309 A.2d 851, 854 (R.I. 1973) ("the general rule confining the scope of cross-examination to facts and matters brought out in direct examination has never been construed as prohibiting inquiries which are designed to explain, contradict or discredit any testimony given by a witness or direct examination or to test his accuracy, memory, veracity or credibility").

Indeed, this principle has been reaffirmed only recently by the Rhode Island Supreme Court in *State v. DeBarros*, 441 A.2d 549 (R.I. 1982), where it reversed a conviction based upon improper restrictions on defense examination. The court held: "In the instant case, defense counsel was not permitted to raise

this issue of bias and was cut off at the threshhold of inquiry. Consequently, we too cannot speculate or guess about the impact upon the jurors of the presentation of this theory of bias." 441 A.2d at 552. Thus, it may hardly be said that counsel's cross-examination bespoke either ignorance or ineptitude or that it ran the risk of possibly depriving petitioner Sundel of the effective assistance of counsel, as characterized by the trial judge.

The lower court's reliance on *United States v. Dinitz*, 424 U.S. 600 (1976) to justify the disqualification of Mr. Breitbart was wholly misplaced. In *Dinitz*, the trial judge disqualified counsel only after counsel repeatedly engaged in incidents of misbehavior and repeatedly and directly flouted the trial court's admonitions. Only under such extreme circumstances, this court held, would disqualification be constitutionally tolerable.

Here, by contrast, there were no previous warnings by the trial court. Indeed, the question of disqualification seems to have been considered *sua sponte* by the court without any prior indication to counsel that such a drastic action was being contemplated.

Moreover, here, unlike in *Dinitz*, none of the incidents cited by the trial judge as the basis for his decision to disqualify Sundel's attorney demonstrated ineptitude or incompetence, let alone the contumacious behaviour cited as the basis for the court's decision in *Dinitz*.

In the absence of such serious misconduct, the courts have uniformly held that the summary removal of counsel violates a defendant's Sixth and Fourteenth Amendment rights and constitutes an abuse of the trial court's discretion.[12] Thus, in

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[12] *See, e.g., People v. Fox*, 97 Mich. App. 324, 293 N.W.2d 814 (Mich. Ct. App. 1980), where the Michigan Court of Appeals found the trial court's removal of counsel to be worthy of censure but harmless error (293 N.W.2d 816-17). On defendant's application for

(footnote continued on following page)

Harling v. United States, supra, 387 A.2d at 1104-6, the District of Columbia Court of Appeals reversed a conviction and ordered reinstatement of original trial counsel, ruling that the trial court's arbitrary removal of appointed counsel over the objection of both the defendant and his attorney violated defendant's Sixth Amendment rights and was not rendered harmless by defendant's having received a competent defense through substitute counsel. In holding that the trial court erred in charging counsel with trying to make what it characterized as a "frivolous" discovery motion, the Court of Appeals held: "Counsel's efforts were within the bounds of reasonable advocacy. His conduct appears neither contemptuous, insolent nor unprofessional. The court's response to counsel's persistence was both intemperate and unwise. Mere disagreement as to the conduct of the defense certainly is not sufficient to permit the removal of any attorney."

387A.2d at 1105.

Similarly, in *McKinnon v. State, supra,* 526 P.2d at 21-24, the Alaska Supreme Court held that even where counsel was guilty of inadequate trial preparation which unjustifiably delayed trial, the trial court nevertheless abused its discretion in removing him, particularly in light of the existence of alternate remedies to censure counsel which would not have invaded the province of the attorney-client relationship:

> The state's crucial interest in the prompt and orderly disposition of criminal cases, however, can be vindicated by other, equally effective sanctions which are not so

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(footnote continued from preceding page)
leave to appeal,the Michigan Supreme Court summarily reversed the Court of Appeals judgment, ordered a new trial and directed the reappointment of original (disqualified) trial counsel. *People v. Fox,* 410 Mich. 871, 299 N.W.2d 912 (Mich. Sup. Ct. 1980). Unlike the case at bar, however, the removal of counsel in *Fox,* as well as in *Harling,* occurred prior to empanelment of the jury and thus, before jeopardy had attached.

> subversive of basic constitutional rights. The court may censure the obstructive attorney, or request the bar association to take disciplinary action. Or the court may assess a fine or impose a term of imprisonment under its contempt powers.
>
> All of these methods of dealing with dilatory conduct are, we think, likely to prove substantially more efficacious than the summary removal of counsel, which, in the final analysis, only penalizes the defendant."
>
> 526 P.2d at 23-24

And in *Smith v. Superior Court of Los Angeles County, supra,* 440 P.2d at 72-74, the California Supreme Court held that even where the trial judge had a subjective belief that the attorney was "incompetent" because of ignorance of the law to try the particular case before him (in that case a capital crime), it was an abuse of the court's discretion to peremptorily remove counsel. While recognizing that the trial judge had the power to intercede in the case of physical incapacity, gross ineptitude or disruptive behavior (440 P.2d at 72-73), the court nonetheless held that however much the judge may disagree with the conduct of the defense:

> The value in issue . . . is "the state's duty to refrain from unreasonable interference with the individual's desire to defendhimself in whatever manner he deems best, using every legitimate resource at his command." (citations omitted).
>
> * * *
>
> [O]ur adversary system . . . is built upon the belief that truth will best be served if defense counsel is given the maximum possible leeway to urge in a respectful but nonetheless determined manner, the questions, objections or argument he deems necessary to the defendant's case . . .
>
> 440 P.2d at 73.

See also, Cannon v. Commission on Judicial Qualifications, 537 P.2d 898, 910-11 (Cal. Sup. Ct. 1975) (accord).

It is, therefore, clear that the trial judge's abrupt disqualification of petitioner Sundel's counsel in the midst of trial was in direct violation of Mr. Sundel's rights under the Sixth and Fourteenth Amendments. Since it was this constitutional violation by the trial judge which precipitated the mistrial, there is no valid showing of the manifest necessity which is an essential prerequisite to allowing the state to place petitioner in jeopardy a second time.

B. The trial judge's unconstitutional disqualification of petitioner Sundel's counsel was the cause of the mistrial.

After the trial judge disqualified petitioner's counsel on the second day of trial, he advised petitioner that the latter was left with three choices--to proceed with the trial *pro se*, to proceed with the co-defendant's counsel serving as attorney for both defendants, or to seek new counsel. When petitioner chose the last alternative, the court declared a mistrial.

The federal courts in denying petitioner's habeas corpus application, held that the question of whether the trial judge had acted properly in disqualifying petiitoner's counsel was irrelevant to the double jeopardy issue. Rather, according to those courts, the only relevant issues were 1) whether petitioner Sundel, "after Mr. Breitbart's removal, voluntarily sought new counsel", and 2) whether his decision to do so constituted the manifest necessity which must be shown to exist before a judge can properly declare a mistrial.

In so holding, the lower courts clearly misconceived the central issue in this case. The question here is not whether Mr.Sundel made a voluntary choice from among the unsatisfactory choices left open to him by the trial judge, but whether the trial judge had improperly deprived him of his preferred choice, to which he was constitutionally entitled—namely, to continue with the trial with Mr. Breitbart serving as his counsel.

As previously mentioned, a defendant's double jeopardy protections are violated if the judge or the prosecutor improperly cause the circumstances which create the "manifest necessity" for a mistrial. *Jones v. Commonwealth*, 400 N.E.2d

(Mass. 1980); *Braxton v. United States,* 395 A.2d 759 (D.C. Ct. App. 1978). In *Jones,* as here, the trial judge had disqualified the defendant's trial counsel in the midst of trial, characterizing his conduct as "scandalous." On appeal, the Massachusetts Supreme Judicial Court held that this disqualification had constituted an abuse of trial court's discretion and, consequently, could not provide a valid basis for the mistrial which the trial judge had thereafter declared to enable the defendant to secure new counsel. Re-prosecution was therefore barred, the court held, by the Constitution's double jeopardy proscription:

> [T]he judge in the present case cannot be said to have "acted responsibly and deliberately" and to have "accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding: (citation omitted).
>
> * * *
>
> . . . . Our conclusion that reprosecution is barred does not trample on the right to trial by an impartial jury, as suggested by the Commonwealth. . . . Rather, it invites a judge to consider a variety of factors in an effort to strike a proper balance between the conflicting interests. . . .
>
> Moreover, the Commonwealth's position also overlooks the many factors that must be considered before a mistrial is declared, such as the right to have a particular tribunal decide a person's fate once and for all, as well asthe right of an accused to retain control over the proceedings in the event of error (citations omitted).
>
> The Commonwealth also argues that a defendant who misbehaves should not be able to escape retrial if the judge thereby declares a mistrial. We agree . . . The short answer to this contention, however, is that the record does not reflect misconduct on the part of Jones's counsel sufficient to penalize Jones or to deprive him of his right against more than one prosecution.
>
> *Jones v. Commonwealth, supra,* 400 N.E. 2d at 249-250.

The parallel between *Jones* and the instant case is striking. Here, as in *Jones,* there was simply no misconduct or in

competence demonstrated by defense counsel. Consequently, the trial judge abused his discretion, as well as Sundel's constitutional rights, when he interfered with the conduct of Sundel's defense by disqualifying his attorney. In these circumstances, it was the trial judge, rather than petitioner, who improperly created the necessity for the declaration of a mistrial.

Even if the trial judge's allegation that Mr. Sundel's counsel was unfamiliar with the local rules had proven to be correct, it would not have justified the extreme steps of disqualifying that attorney from representing Sundel and then declaring a mistrial. It is well established that before a mistrial may properly be declared, the judge must first explore all reasonable alternatives. Failure to do so is itself a violation of double jeopardy barring re-prosecution. *See e.g., Brady v. Samaha, supra,* 667 F.2d at 228 (failure to confer with defendant or counsel before declaring a mistrial is improper); *see also United States v. Lynch,* 598 F.2d 132 (D.C. Cir. 1978) (defense counsel must be given effective opportunity to explore alternatives); *United States v. Pierce,* 593 F.2d 415 (1st Cir. 1979) (Aldrich, J.) (failure to explore use of curative instruction to dissipate possible jury taint bars retrial); *United States v. McKoy,* 591 F.2d 218 (3rd Cir. 1979) (duty of appellate court to see that alternatives to declaring a mistrial were completely canvassed); *United States v. Sanders,* 591 F.2d 1293 (9th Cir. 1979) (accord); *United States v. Rich,* 589 F.2d 1205 (10th Cir. 1978) (abuse of discretion); *Dunkerly v. Hogan, supra,* (mistrial improper where continuance was fair, practical and feasible alternative); *United States v. Starling,* 571 F.2d 934 (5th Cir. 1978) (no argument from counsel as to necessity for mistrial and no consideration of alternatives).

The most reasonable alternative, and one which has been recognized by numerous courts in analogous circumstances, would have been to have allowed Sundel to continue with Mr. Breitbart as counsel after conducting a thorough *voir dire* with Sundel to insure that he was fully aware of any possible "impediments" which the trial judge foresaw in Mr. Breitbart's

continued representation. It has been held repeatedly that a defendant's Sixth Amendment right to counsel of his own choice is of such paramount importance that even where the court perceives trial counsel to be "ineffective," a defendant is entitled to continue with such counsel as long as his decision to do so is the product of a knowing, intelligent and voluntary choice. *United States v. Mahar,* 550 F.2d 1005, 1009 (5th Cir. 1977); *United States v. Garcia,* 517 F.2d 272 (5th Cir. 1975); *People v. Johnson,* 75 Ill.2d 180, 387 N.E.2d 688 (1979).

People v. Johnson, supra, is particularly instructive in this regard. In that case—as in the case at bar—the trial court felt that the defendant was not receiving effective assistance of counsel and advised the defendant of its opinion. However, unlike the case at bar, the trial court in *Johnson* enumerated several alternatives for the defendant, among them the declaration of a mistrial to enable him to obtain new counsel or allowing the trial to proceed as long as the defendant fully understood the trial court's doubts about his lawyer's competence. The defendant chose the latter course and the Illinois Supreme Court ratified the trial court's decision to allow counsel to remain in the face of defendant's unequivocal waiver of his right to "competent" counsel. *Id.,* 387 N.E.2d at 690; *See also, People v. Friedrich,* 20 Ill.2d 240, 169 N.E.2d 752 (1960); *Faretta v. California, supra.*

As the *Johnson* court observed:

> [T]he trial judge was thrust into a curious position in endeavoring to protect the rights of the defendant. The defendant's constitutional right to counsel entitles him both to effective assistance of counsel and to counsel of his own choosing. Typically, both corollaries coexist symbiotically. Here, however, where the judge had determined that defendant's choice of counsel was not providing the defendant with competent representation, one had to be sacrificed.
>
> * * *
>
> In the case at bar, defendant's right to counsel of his own choice, like Faretta's right to represent himself and

> Freidrich's right to counsel of his own choice, required that he be allowed to make a voluntary, knowing and understanding waiver of the right to competent counsel in order to receive the representation of his choice.
>
> * * *
>
> A review of the record reveals that the defendant's waiver of competent counsel was voluntarily, knowingly and understandingly made. Defendant waived his right to competent counsel on the morning of the second day of trial. By that time, defendant had become aware of the nature and severity of the charges against him. . . . We are convinced that defendant was sufficiently aware of the likely consequences of continuing with incompetent counsel, and, therefore, hold the defendant's waiver of competent counsel was valid.
>
> *Id.*, 387 N.E.2d at 690-91.

In this case, by contrast, the trial court refused to afford petitioner such an alternative. Rather, over petitioner's protests that he wished the trial to continue, that he wished Mr. Breitbart to remain as his counsel and that he would willingly waive any claims he might have as to Mr. Breitbart's alleged "unfamiliarity" with local rules and procedures, the trial court refused to allow Mr. Breitbart to continue as counsel or even to discuss that alternative with petitioner.

Such arbitrary disqualification was, thus, plainly improper, particularly in the face of petitioner's request that he be permitted to "waive" any questions as to counsel's competence. Indeed, as noted by the Fifth Circuit, under analogous circumstances: "If Mahar had expounded his right to continue Miteff as his counsel, the district court would have had no choice but to allow Mahar the right to choose his own counsel. Even the acutely attuned conscience of a judge cannot supervene the Sixth Amendment." *United States v. Mahar, supra,* 550 F.2d at 1009.

In this regard, it is once again necessary to point out that the lower courts' reliance on *United States v. Dinitz, supra,* was

misplaced. There, the defense attorney's conduct was contumacious; consequently, it was not a factor affecting only the defendant which the defendant could effectively waive. Rather it was an affront to the court which was, therefore, justified in ordering counsel's exclusion from further proceedings. Here, to the contrary, the trial court never claimed that defense counsel was contumacious, but only, at worst, ineffective. Indeed, even after disqualifying Mr. Breitbart, the trial judge characterized him as "very personable." (Tr. 245, April 2, 1982). Since counsel's alleged ineffectiveness affected only petitioner, it was a disqualification which petitioner could properly have waived. Consequently, the trial judge's refusal to allow him that alternative was clearly improper.

The federal courts, in denying petitioner's habeas corpus petition, relied heavily on the fact that after the trial judge disqualified Mr. Breitbart, he still gave Mr. Sundel three alternatives for proceeding—*pro se*, with co-defendant's counsel representing both defendants, or with new counsel. This the lower courts seemed to believe, was sufficient to render Mr. Sundel's choice a voluntary and knowing waiver of his double jeopardy rights.

The simple answer to this argument is that the three options offered to petitioner Sundel were, in reality, not valid alternatives.[13] For a layman such as Mr. Sundel, untutored in court procedures or the rules of evidence, to proceed *pro se* to defend himself against the charges in this case would have been sheer lunacy. Likewise, proceeding with co-defendant's counsel representing both defendants was not a valid alternative. The decisions pointing out the pitfalls and the lack of wisdom in joint representation are legion. *See, e.g., Holloway v. Arkansas*, 435 U.S. 475 (1978); *United States v. Donahue*, 560 F.2d 1039 (1st Cir. 1977). Moreover, co-defendant's counsel immediately removed this option as a realistic alternative by advising the court that the two defendants had conflicting

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[13] Nor were these the only options left available to the trial judge. Among others, the trial could have been continued for the length of time necessary for new counsel to prepare to finish the trial (*see, e.g., United States v. Tramunti*, 513 F.2d 1087, 1117 (2d Cir. 1975); he could

(footnote continued on following page)

defenses.[14] As *Dinitz* makes plain, where the defendant is in effect confronted with such a "Hobson's choice"—giving up his first jury or facing a trial in which he is substantially prejudiced—waiver must not lightly be inferred. (*Id.*, 424 U.S. at 609).

The more important response to the district court's argument, however, is that regardless of whether any of the options left to petitioner had any validity, he wasn unconstitutionally being deprived of his single preferred option—to continue with the trial with Mr. Breitbart as his counsel. Once that option was improperly eliminated by the trial judge, the defendant's decision to seek new counsel rather than proceeding *pro se* or with joint representation was simply making the best of the constitutionally intolerable situation which had been forced upon him by the trial judge. Under such circumstances, even if

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(footnote continued from preceding page)

have granted a short continuance for new local counsel to enter the case with Mr. Breitbart to advise him, if necessary, when and if matters of local rules and procedures were raised; or, as in *United States v. Dinitz*, 424 U.S. 600 (1976), the trial judge could have granted a recess to allow petitioner Sundel to ask the Rhode Island Supreme Court to review the propriety of expelling his attorney

[14] Although co-defendant's counsel was serving as local counsel for Mr. Sundel and his attorney, that role has traditionally been a largely ministerial one—providing a local office for out-of-town counsel and a mailing address for the service of court papers. Even though the *pro hac vice* application stated that local counel would be ready to serve as defendant's attorney in the event that his chosen counsel became unavailable, the simple fact is that Sundel's chosen attorney was available and fully prepared to represent his client. The trial judge's arbitrary disqualification of Sundel's chosen counsel was not rendered somehow constitutionally tolerable because co-counsel was fulfilling the technical functions of local counsel, especially where, as here, the court wa made aware before trial of the conflict between the defendants by co-counsel's motion to sever.

Sundel had expressly requested a mistrial, which he did not,[15] it would not have constituted a knowing and voluntary waiver of his double jeopardy rights, but rather, only a recognition of the fact that "continuation of the tainted proceeding would result in a conviction." *United States v. Dinitz, supra,* 424 U.S. 608, 611; *see also, Oregon v. Kennedy,* _____U.S._____, 102 S.Ct. 2083 (1982). As the court said in *Braxton v. United States, supra,* 395 A.2d at 767, even a defendant's express request for a mistrial in such circumstances "is not an exercise of control by the defendant but a recognition that the defendant has already lost his primary control through the bad faith of a governmental actor, and retrial is barred even though, in a formalistic sense, the mistrial was granted at the defendant's instance."

The trial court's disqualification of petitioner's counsel in the midst of trial was both improper and unconstitutional. As such, it cannot properly be found to constitute the "manifest necessity" justifying the consequent declaration of a mistrial. Petitioner has a constitutional right to complete his trial with the jury whichhad already been empanelled, represented by his chosen counsel. Since these "valued" rights were violated by the actions of the trial judge in this case, any retrial would likewise be unconstitutional. Consequently, the charges against Mr. Sundel must be dismissed.

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[15] Sundel did not specifically request a mistrial, but merely the opportunity to secure new counsel. It was the trial judge who then used this request for new counsel as an opportunity to declare a mistrial.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

For the First Circuit

WILLIAM A. SUNDEL,

Petitioner, Appellant,

No. 83-1702 v.

JUSTICES OF THE SUPERIOR COURT
OF THE STATE OF RHODE ISLAND,

Respondents, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[Hon. Bruce M. Selya, U.S. DISTRICT JUDGE]

Before
CAMPBELL, *Chief Judge.*
BREYER, *Circuit Judge,*
AND BETTINE,* *Senior District Judge.*

MICHAEL YOUNG for appellant.
KENNETH P. MADDEN, Assistant Attorney General, with whom DENNIS J. ROBERTS II, Attorney General, was on brief, for appellee.

FEBRUARY 29, 1984

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* Of the District of Rhode Island, sitting by designation.

Appendix A

BREYER, *Circuit Judge*. William Sundel was tried in Rhode Island state court on serious drug charges. David Breitbart, a New York lawyer, appeared *pro hac vice* to defend him, along with "associate" (or "local") counsel John O'Neill. O'Neill also represented Sundel's codefendent. During the course of pretrial proceedings, the trial judge began to fear that Breitbart's representation of his client was inadequate, perhaps because of Breitbart's ignorance of local rules and procedures. On the first day of trial, after observing Breitbart's efforts to cross-examine the policeman who had seized the drugs, the judge had a series of conversations with both counsel—some on the record and some off the record in chambers—about what he saw as Breitbart's inadequacies. The upshot was that the judge, referring as authority to *United States v. Dinitz*, 424 U.S. 600 (1976), revoked Breitbart's permission to appear. He then asked Sundel whether he wished to proceed with O'Neill as counsel, represent himself, or obtain other counsel. O'Neill said that he believed there was a "conflict of interest." Sundel said that he would like to engage other counsel. The judge then took the case from the jury "at Mr. Sundel's request" and set a new trial date.

Subsequently Sundel argued that a new trial would violate the protection against "double jeopardy" provided by the fifth amendment. The Rhode Island Supreme Court ultimately rejected this argument on the ground that Sundel himself requested, or acquiesced in, the court's decision to remove Breitbart. *Compare Oregon v. Kennedy*, 456 U.S. 667, 679 (1982). Sundel sought habeas in the federal district court. It was denied on the ground that, whether or not Sundel agreed to replace Breitbart, once the trial judge revoked Breitbart's permission to appeal, Sundel himself sought a new trial. Sundel appeals the decision denying his habeas petition.

We affirm the denial, for, in our view, the state trial judge correctly invoked the authority of *United States v. Dinitz*, *supra*. We find that case factually similar and legally indis

tinguishable. *Dinitz* involved a Florida trial of a defendant who was represented by a New York lawyer, Wagner, appearing *pro hac vice*, and a local counsel, Meldon. Wagner's behavior at the trial, as the Supreme Court described it, consisted of the following:

> Wagner then began his opening statement for the defense. After introducing himself and his co-counsel, Wagner turned to the case against the respondent:
>
> > "Mr. Wagner: After working on this case over a period of time it appeared to me that if we would have given nomenclature, if we would have named this case so there could be no question about identifying it in the future, I would have called it The Case—
> >
> > "Mr. Reed [Asst. U.S. Attorney]: Your Honor, we object to personal opinions.
> >
> > "The Court: Objection sustained. The purpose of the opening statement is to summarize the facts the evidence will show, state the issues, not to give personal opinions. Proceed, Mr. Wagner.
> >
> > "Mr. Wagner: Thank you, Your Honor. I call this the Case of the Incredible Witness." App. 20.
>
> The prosecutor again objected and the judge excused the jury. The judge then warned Wagner that he did not approve of his behavior and cautioned Wagner that he did not want to have to remind him again about the purpose of the opening statement.

Following this initial incident, the trial judge found it necessary twice again to remind Wagner of the purpose of the opening statement and to instruct

> him to relate "the facts that you expect the evidence to show, the admissible evidence." *Id.*, at 82. Later on in his statement, Wagner started to discuss an attempt to extort money from the respondent that had occurred shortly after his arrest. The prosecutor objected and the jury was again excused. Wagner informed the trial judge of some of the details of the extortion attempt and assured the court that he would connect it with the prospective Government witness Cox. But it soon became apparent that Wagner had no information linking Cox to the extortion attempt, and the trial judge then excluded Wagner from the trial and ordered him to leave the courthouse.

The trial judge asked Meldon if he would proceed. Meldon said he was not sufficiently prepared. The judge then asked the defendant if he wanted 1) a stay pending an application to appeal; 2) to proceed with Meldon (and a law professor Baldwin); or 3) a mistrial in order to obtain other counsel. The defendant asked for a mistrial, which was granted. 424 U.S. at 602-04.

Before his second trial, Dinitz argued that, on these facts, to retry him would put him in "double jeopardy." He said he had wanted to keep Wagner as his lawyer. Once Wagner was removed, given Meldon's lack of familiarity with the witnesses, he was "forced" to ask for a mistrial. Thus, the trial was terminated over his objection. Unless there was "manifest necessity" for doing so, a second trial was barred. *Arizona v. Washington*, 434 U.S. 479, 509 (1978); *Illinois v. Somerville*, 410 U.S. 458, 463 (1973); *see Oregon v. Kennedy*, 456 U.S. at 672-73.

The Supreme Court accepted Dinitz's premises, but rejected his conclusion. The Court agreed that Dinitz had not waived his right to proceed with Wagner. It said, however, that

> traditional waiver concepts have little relevance . . . . The important consideration, for purposes of the

> Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed . . .

after a serious trial court error [such as depriving Dinitz of his counsel assuming, for the sake of argument, that doing so was error.). *United States v. Dinitz*, 424 U.S. at 609-10. Unless the judge's action in, say, removing Wagner "was motivated by bad faith or undertaken to harass or prejudice" the defendant, the Double Jeopardy Clause does not prevent a retrial as long as the defendant is offered the choice of continuing. *Id.* at 611. Otherwise trial judges would be tempted simply not to allow the defendant that choice; they would require the trial to proceed to its conclusion leaving the defendant with appeal and *retrial* as his only remedy. That is to say, the judge might have required Dinitz to proceed through a trial with Meldon as his lawyer. Dinitz, if convicted, would have had to appeal. And, according to the Court, "the Double Jeopardy Clause" would then "present no obstacle to a retrial." *Id.* at 610. Rather than encourage the trial judge to follow this complicated route to obtain a new trial, the Court held that a defendant's request for a mistrial, in these circumstances, will simply be taken at face value; the case will *not* be treated as one in which a new trial was ordered "over his objection;" thus a new trial will be permitted. *Id.* at 608-11; *see Oregon v. Kennedy*, 456 U.S. at 672.

Sundel seeks to distinguish *Dinitz* in three ways. First, he argues that Wagner's conduct was far more egregious than was Breitbart's. We do not agree. The trial judge lists, among other instances of doubtful conduct, the following:

1) Breitbart brought a motion to suppress evidence without showing his client's standing, a fact that, in the judge's view, was likely sufficient under Rhode Island law to doom the motion.

2) During the voir dire Breitbart questioned the jury in a way apparently aimed at suggesting that the key prosecution witness had a motive not to tell the truth. The prosecution objected, because the line of questioning seemed well beyond

that permitted by R.I. R. Crim. P. 24, which allows questioning for the purpose of determining whether a prospective juror is

> related to a party, or has any interest in the case, or has expressed or formed an opinion or is sensible of any bias or prejudice therein.

Breitbart then stated, in the juror's hearing, "My question is with the individual motivation to lie." The judge rebuked Breitbart for this and other departures from the rules.

3) Breitbart's opening statement to the jury referred several times to the key witness as having "lied," and as having "schemed." Canon 7 of the Rhode Island Canons of Ethics states that a lawyer shall not "assert his personal opinion . . . as to the credibility of a witness."

4) Breitbart's effort to cross-examine Corporal Malley, who seized the drugs, went well beyond the scope of direct examination, contrary to Rhode Island practice. Breitbart apparently was trying to use his cross-examination of this early witness to show that Hall, the key witness who would testify later, had made inconsistent statements. The prosecution objected, Breitbart was admonished by the judge, but Breitbart kept returning to this line of questioning.

Sundel seeks to defend Breitbart's conduct as proper under Rhode Island law. His arguments, as to some of these matters, are plausible; but as to others, they are weak. He points, for example, to Rhode Island cases that allow cross-examination beyond the scope of direct "to establish possible bias, prejudice or ulterior motives." *State v. O'Brien*, 412 A.2d 231, 233 (R.I. 1980); *State v. Bennett*, 405 A.2d 1181, 1183 (R.E. 1979); *State v. Ragonesi*, 309 A.2d 851, 854 (R.I. 1973). But these cases concern impeachment of the *witness being examined*, not impeachment of another witness who has not, as yet, even testified. Nor do we believe the trial judge took a few isolated matters out of context. Rather, we agree with the federal district judge, in this

case, who was formerly an experienced Rhode Island trial attorney, when he notes that:

> the trial judge seems, at the very least, to have had reasonable grounds to question Breitbart's familiarity with local practice and procedure, based on his filing and handling of motions, his conduct of jury voir dire, his opening statement, and his cross examination of Detective Malley.

Further, Wagner's conduct seems no more egregious than Breitbart's in any relevant sense. Wagner may have acted deliberately rather than through ignorance, but we do not see how that fact affects what was at issue in *Dinitz* (and here), namely defendant's right to counsel of his choice. Whether Wagner's or Breitbart's conduct was bad enough or incompetent enough to warrant removal is also beside the point, for in *Dinitz* the Supreme Court was willing to accept "the appellate court's conclusion that the trial judge overreacted in expelling Wagner from the courtroom." *United States v. Dinitz*, 424 U.S. at 611.

Finally, here, as in *Dinitz*

> the respondent has not contended, and the record does not show that the judge's action was motivated by bad faith or undertaken to harass or prejudice the respondent.

Id.

Second, Sundel argues that the trial judge had greater reason than the judge in *Dinitz* to know that disqualification of Breitbart would likely lead to a new trial. He correctly points out that the judge knew O'Neill was representing a codefendant; prior to trial, a motion to sever had been made; thus, the judge was aware of a possibility of conflict of interest. There was no such apparent conflict in *Dinitz*.

This difference is not dispositive, however, for the trial judge did not know, nor could he even be reasonably sure, that Sundel

would reject O'Neill as counsel. For one thing O'Neill had previously filed an appearance for Sundel as well as for the codefendant. For another, Breitbart's motion to appear stated

> in my absence from any hearing or trial . . . my associate counsel [O'Neill] may act for and on my behalf in the conduct of such hearing or trial.

At most one might find a somewhat greater likelihood here, than in *Dinitz,* that disqualification would lead to a "new trial" choice. But, the language of *Dinitz* suggests that these shades of difference do not matter short of the point where the trial judge *knows* that the present trial must be aborted.

Third, Sundel argues at length that he did not "waive" his right to have Breitbart represent him. And, he adds that any such waiver must be "convincingly established on the record" as a waiver of a fundamental constitutional right. These "waiver" arguments, however, are precisely those rejected in *Dinitz. See United States v. Dinitz,* 424 U.S. at 609 n.11. The Court says that "waiver" is scarcely relevant; it *agrees* that defendant may face a "Hobson's choice" after a judge erroneously deprives him of counsel of his choosing. But, the Court's point is that defendants, faced with such errors, even horrendous ones, normally must wait until after they are convicted, then appeal, and, when vindicated, undergo a new trial. A defendant should not be *better off* (*i.e.* immune from trial) because the judge gives him the choice of the new trial in advance. This reasoning applies here.

Sundel's argument in essence is that of the *Dinitz* court of appeals. It is the argument that the Supreme Court rejected. We see no meaningful distinction. Thus, the decision of the district court must be

Affirmed.

APPENDIX B

The United States District Court

For the District of Rhode Island

WILLIAM A. SUNDEL

v. C.A. No. 83-0383-S

JUSTICES OF THE SUPERIOR COURT, STATE OF RHODE ISLAND: ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND

OPINION

BRUCE M. SELYA, United States District Judge

This petition for a writ of habeas corpus is brought against the Justices of the Superior Court for the State of Rhode Island and the state's Attorney General. The petitioner, William A. Sundel, seeks to prevent the state from proceeding further with a pending criminal prosecution. Jurisdiction is bottomed on 28 U.S.C. § 2254.

Sundel and several codefendants (including one Frank W. Nelson) were indicted in October of 1981 in Kent County Superior Court for possession of marijuana with intent to deliver the same and for conspiracy to commit that substantive offense. Following indictment, John A. O'Neill, Jr., a member of the Rhode Island bar, entered his appearance for both Sundel and Nelson. Subsequent to that entry of appearance, Sundel retained a member of the New York bar, David Breitbart. Since Breitbart was not admitted to practice in Rhode Island, he sought leave to appear as petitioner's trial counsel *pro hac vice*. His motion (hereinafter the "Motion"), supported by O'Neill's agreement to associate with Breitbart and to continue to serve as Sundel's local counsel, was granted by the superior court on January 4, 1982. Thus, both prior to commencement of trial and during the ensuing trial itself, petitioner enjoyed dual representation by Breitbart and O'Neill; his defense, however, was controlled by Breitbart as lead counsel.

Appendix B

After characteristic (and largely unremarkable) preliminary skirmishing, a jury was empanelled on March 31, 1982. By that time, only Sundel and Nelson remained before the court. The taking of testimony began on April 1st. Although it is unclear from the record when the trial judge began to question Breitbart's ability to provide efficacious assistance of counsel, the notion was firmly implanted in the judge's mind by the time of adjournment on the first day of actual trial.[1] Following adjournment on that date, the judge conducted an in-chambers conference with all counsel present. The precise details of that chambers conference are obscure (as the court reporter was not present), but one thing is crystal clear: the judge broached the subject of Breitbart's appreciation and comprehension of Rhode Island procedure and rules of evidence and raised, *sua sponte,* the question of Breitbart's capacity to render effective assistance to Sundel. R. of May 21, 1982 hearing at 2-3. It also appears reasonably certain that the judge advised Breitbart during the chambers conference that his right to appear as trial counsel in the case was at risk. *Id.;* 2 R. at 230-31.

When court resumed on April 2, 1982, the trial justice revoked Breitbart's permission to appear as counsel. He then gave petitioner three alternatives, vis., (i) proceeding *pro se,* or (ii) proceeding with O'Neill as his counsel, or (iii) seeking new counsel. *Id.* at 236. In connection with the last option, the trial justice had emphatically forewarned the petitioner that he would, if this alternative proved to be Sundel's preference, "take this case from the jury". *Id.* at 229. O'Neill then stated his view that there would be a conflict of interest if he acted for both Sundel and Nelson. *Id.* at 236-37. Sundel thereupon sought the opportunity to engage a new trial attorney. *Id.* at 237. The

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[1] The first day of trial ended with the proffer by Breitbart, out of the presence of the jury, of a self-styled "due process application", and a motion by attorney O'Neill (acting on Nelson's behalf) for a mistrial.

judge acceded to this request and concomitantly declared a mistrial.[2]

Subsequently, Sundel moved to dismiss the indictment on the ground that a retrial would constitute a violation of the petitioner's right not to be placed twice in jeopardy. The trial court denied the motion. On Sundel's application, the Rhode Island Supreme Court stayed all proceedings, and granted a petition for writ of certiorari on July 9, 1982. Following submission of briefs and oral arguments, that court rejected the double jeopardy contention and remanded the case for trial in the superior court. *State v. Sundel*, 460 A.2d 939, 944 (R.I. 1983).

With a new trial imminent, the petitioner swiftly explored two further avenues of relief. On June 7, 1983, Sundel requested that the state supreme court reconsider the matter; and, on June 10, 1983, he filed an application for a writ of habeas corpus here, and requested that this court enjoin the state from retrying him until the state supreme court had acted on his prayer for rehearing. This court, in an *ora sponte* bench decision, denied the request for a restraining order both because the petitioner had not exhausted his pursuit of a stay of prosecution from the state supreme court and because it was chary of hasty federal interference in ongoing state criminal proceedings. *See Younger v. Harris*, 401 U.S. 37, 49 (1971). Shortly thereafter (and before the criminal case was again reached for trial in the superior court), the state supreme court denied Sundel's motion for rehearing. He now presses his application in this court for the writ of habeas corpus, retrial of the state court prosecution being imminent.

The petitioner contends that his retrial will violate the Double Jeopardy Clause of the U.S. Constitution, and also

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[2] Nelson's motion to pass, *see* n. 1 *ante*, was at this point granted. *Id.* at 237.

argues that Breitbart's disqualification by the trial court violated his Sixth Amendment right to counsel. The state opposes the petition on grounds that a retrial will not implicate Sundel's rights under the Double Jeopardy Clause inasmuch as the petitioner, despite characterizations to the contrary contained in Sundel's application, voluntarily moved for a mistrial; and that an aborted trial, so induced, does not bar the occurrence of a second trial. Further, the state asserts that the revocation of Breitbart's permission to act for Sundel was fully justified and in no way contravenes petitioner's Sixth Amendment prerogatives.

EXHAUSTION OF REMEDIES

Before reaching these issues, however, the court must deal with a threshold contention advanced by the respondents. The state seeks dismissal of the petition on procedural grounds. asseverating that it contains both exhausted and unexhausted claims, *see Rose v. Lundy,* 455 U.S. 509 (1982); and that this court is thus debarred from entertaining the application by reason of 28 U.S.C. §§ 2254(b) and (c). In particular, the state contends that the Rhode Island courts have not passed upon Sundel's Sixth Amendment claim; and that the instant case is thus brought within the parameters of *Rose v. Lundy, supra.* This Court disagrees. Exhaustion of state remedies does not require that the state judiciary decide each issue presented but only that the issues presented in the federal habeas petition be presented to, and addressed fully in, the state courts. *Smith v. Digmon,* 434 U.S. 332, 334 (1978); *Williams v. Holbrook,* 691 F.2d 3, 8 (1st Cir. 1982); *Williams v. Moran,* C. A. No. 82-0347P, slip op. at 4 (D.R.I. April 8, 1983). The doctrine demands only that the state courts be accorded a meaningful opportunity to confront the federal constitutional claims of a habeas petitioner before the district court asserts jurisdiction; the decisive question is whether or not the "substance" of the asserted claims have been squarely tendered to the state judiciary. *Anderson v. Harless,* 103 S. Ct. 276, 277 (1982); *Easton v. Holbrook,* 671 F.2d 679, 681 (1st Cir. 1982).

Surely, a petitioner cannot spring neoteric factually allegations or previously-undeveloped legal theories upon the district court, *see Anderson v. Harless,* 103 S. Ct. at 277, but that is not the case at bar. Here, notwithstanding that the opinion of the state supreme court is silent as to the Sixth Amendment issue, Sundel fulsomely briefed this argument and presented it four-square in the certiorari proceedings. The gravamen of the Sixth Amendment contention here is identical to that eschewed by the state supreme court. Nothing about Sundel's present asseveration can fairly be said to "transform his claim or cast it in a significantly different light." *Domaingue v. Butterworth,* 614 F.2d 8, 12 (1st Cir. 1981). *Rose v. Lundy, supra,* is but a red herring in such circumstances, for Sundel indeed has exhausted his state remedies within the meaning of 28 U.S.C. § 2254(b).

DOUBLE JEOPARDY

The Fifth Amendment to the Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." This admonition has been interpreted in certain circumstances to bar the retrial of individuals when the first trial has ended in a mistrial. *E.g., Arizona v. Washington,* 434 U.S. 497, 505 (1978); *Illinois v. Somerville,* 410 U.S. 458, 471 (1973). Unlike an acquittal or a conviction (where the bar is automatic, *see Arizona v. Washington,* 434 U.S. at 505), a mistrial does not however, *ipso facto* prevent the state from retrying the accused. If the defendant requests that the trial be halted, or consents to a motion to pass, then no constitutional barrier exists to a retrial unless the defendant can show that the state contrived to provoke the motion. *Oregon v. Kennedy,* 456 U.S. 667, 679 (1982). On the other hand, a mistrial declared *sua sponte* over the objection of the defendant will ordinarily foreclose retrial unless there was manifest necessity for the judge's action. *Id.* at 672; *Brady v. Samaha,* 667 F.2d 224, 228 (1st Cir. 1981).

Applying these principles to the case at hand, this court first must ascertain whether the petitioner, after Breitbart's re-

moval, voluntarily sought new counsel. If the court so finds, it then must determine whether manifest necessity required the superior court to declare a mistrial. If the court answers yes to both inquiries, a retrial of Sundel is not barred by the Double Jeopardy Clause.

Sundel focuses on the trial justice's disqualification of Breitbart as the crucial act in this drama. That emphasis is misplaced. The trial court did not spin a seamless web, linking Breitbart's removal to the cessation of the trial. Rather, once Breitbart had been excluded from further participation in the case, the judge gave Sundel the three options enumerated above. *See* text, *ante*. Two of these alternatives would not have required a mistrial at all. The first option, proceeding *pro se*, presumably was rejected out of hand by Sundel. The second, continuing with Attorney O'Neill as trial counsel, was foreclosed by O'Neill's perception of a conflict of interest—not by juristic fiat. The petitioner then opted to seek successor counsel. At that point, faced with the virtual certainty of a lengthy continuance in order for the petitioner to secure new counsel and for such counsel properly to prepare, the judge took the case from the jury. Implicit in this action was a finding of manifest necessity. Indeed, had the judge insisted that a newly-engaged attorney pick up the trial in mid-stream and on a moment's notice, Sundel's present protestations would have been mild compared to the howling which would have ensued. Fundamental deference to the rights of the accused necessitated that the suprerior court, confronted with the dilemma posed by Sundel's decision to retain new counsel, abort the trial.

Other courts, when faced with the possibility of extended delay due to the absence of counsel, the unavailability of the judge, or the like, have properly held that manifest necessity required the declaration of a mistrial as opposed to the grant of a continuance. *See, e.g., United States v. Lynch*, 598 F.2d 132, 135 (D.C. Cir. 1978); *United States v. Williams*, 411 F. Supp. 854, 858 (S.D.N.Y. 1976). Since Sundel, by his election to retain

a new lawyer, left the court with no viable alternative other than to announce a mistrial, his anticipated retrial would appear to fall well outside of the proscriptions of the Double Jeopardy Clause. He attempts, however, to square the circle by contending that such election was not volitional, *i.e.*, it was forced upon him by the trial judge's peremptory action in disqualifying Breitbart. The petitioner claims that he was left with no real choice at that point, since he did not want to defend himself and since the judge was well aware of the conflict between the defendants and of the fact that such conflict would effectively foreclose petitioner's continued representation by O'Neill. Thus, petitioner reasons, his request for new counsel was a coerced response, forced upon him unfairly and without reason. This court need not determine, however, whether the judge's action in removing Breitbart was proper;[3] suffice it to say that Sundel was not, as he now contends, effectively compelled by the trial justice to request new counsel.

O'Neill's entry of appearance as Sundel's attorney was made contemporaneously with his initial appearance as Nelson's lawyer. Breitbart, in seeking to appear as Sundel's trial counsel, was content to associate himself in Sundel's defense with O'Neill—and O'Neill was, for aught that appears of record, similarly satisfied. O'Neill was every bit as much a part of Sundel's defense team as associate counsel as he would have been as lead counsel; when a lawyer enters an appearance for a client, he commits himself fully and without reservation to the client's cause, whether or not other counsel share that responsibility. At the time Breitbart's *pro hac vice* motion was granted, it was premised upon Breitbart's express assurance to

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[3] Although supererogatory under the circumstances, it should be noted that the trial judge seems, at the very least, to have had reasonable grounds to question Breitbart's familiarity with local practice and procedure, based upon his filing and handling of motions, his conduct of jury voir dire, his opening statement, and his cross-examination of Detective Malley.

the court that "in my absence from any hearing or trial . . . my associate trial counsel [O'Neill] may act . . . in the conduct of such hearing or trial." Motion, ¶ 3. The Motion was assented to by O'Neill and by Sundel. Such assent necessarily signified acquiescence in the agreements limned thereby. Thus, to imply, as does Sundel's present counsel, that the trial justice cunningly held out to Sundel an illusory option by inviting him to continue the trial with O'Neill in the lead, is baseless. If an irremediable conflict barred O'Neill from handling Sundel's defense alone, then it likewise should have precluded his service as local counsel; and the fact that O'Neill had never sought to withdraw from that service[4] was a solid indication to the court that no conflict existed and that the proferred alternative was a real one.

Viewed in this light, the actions of the trial judge cannot fairly be said to have been calculated to euchre or to provoke Sundel into a request for a mistrial. Nor does the record support any inference that the trial justice acted in bad faith; to the contrary, he appears to have displayed commendable deference to, and solicitude for, the rights of the accused.

Accordingly, the court finds that Sundel, having been apprised of his options, chose to avail himself of the opportunity to secure successor counsel (well knowing that such a choice would vitiate the trial then in progress); that this election was made freely and voluntarily; that the trial justice acted out of manifest necessity in declaring a mistrial; and that the series of events was not provoked, within the ambit of

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[4] It should be noted that neither Breitbart nor Sundel had, up to that point, sought O'Neill's ouster.

Oregon v. Kennedy, supra, by the court or by the prosecution.[5] It follows inexorably that a new trial will not breach the penumbras of the Constitution nor result in placing the petitioner doubly in jeopardy.

ASSISTANCE OF COUNSEL

Since a retrial is constitutionally permissible, Sundel's claim that his Sixth Amendment rights were violated by Breitbart's ouster becomes, for all intents and purposes, moot.[6] The instant application seeks to release Sundel from the custody of bail, and to bar his re-trial. Yet, the anodyne for improper abridgement of the right to perficient counsel in such a context is a new trial—no more. *See, e.g., United States v. DiFrancesco*, 449 U.S. 117, 131 (1980); *North Carolina v. Pearce*, 395 U.S. 711, 720 (1969). Thus, even if Sundel's claim was to be credited—and this court does not offer any opinion as to the merit of this contention—custody would nonetheless continue and Sundel's retrial would nonetheless take place. It would, therefore, be a meaningless exercise for this court, at this time, to delve into the substance of Sundel's assertions in this respect.

The application for issuance of a writ of habeas corpus is denied and dismissed, and the concomitant prayer for injunctive relief is likewise denied.

So ordered.

/S/ Bruce M. Selya

BRUCE M. SELYA
UNITED STATES DISTRICT JUDGE

August 23, 1983

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[5] There is nothing in the record which suggests any benefit or incentive to the state from the mistrial. Although the trial was in its early stages, the prosecution was velivolant at the time of Breitbart's show-down with the trial justice.

[6] Indeed, while vaticination is a chancy sport at best, this may well explain why the state supreme court declined to pass upon petitioner's argument in this regard.